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In re Application of :
Barclay et al. :
Application No. 09/778,365 : DECISION DISMISSING
Filed: 8 February, 2001 : PETITION
Attorney Docket No. 50533 :

This is a decision on the thrice renewed petition under 37 CFR 1.10 filed by facsimile on 24 June, 2002, requesting that the above-identified application be accorded a filing date of 7 February, 2001, rather than the presently accorded filing date of 8 February, 2001.

The petition is again dismissed.

Petitioners allege that the application was deposited in Express Mail service on 7 February, 2001. In support, petitioners have provided a copy of a USPS Fax Transmission stating that an Express Mail shipment bearing Express Mail No. EL770089445US (the same Express Mail label number found on the itemized transmittal letter accompanying the original application papers located in the official file) showing that the application was delivered on 8 February, 2001.

Paragraph (c) of 37 CFR 1.10 states that:

Any person filing correspondence under 37 CFR 1.10 that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show a discrepancy between the filing date accorded by the Office to the correspondence and the date of deposit as shown by the "date-in"

on the "Express Mail" mailing label or other USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;

(2) The number of the "Express Mail" mailing label was placed on the papers or fees that constitute the correspondence prior to the original mailing by "Express Mail;" and

(3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

The instant petition lacks the showing required by item (1).

In regards to item (1), petitioners should note that in the absence of convincing evidence of the date of deposit, the application will be accorded a filing date as of the date of receipt in the USPTO.¹ In this case, despite four (4) attempts to do so, petitioners have failed to establish 7 February, 2001, as the date the application was **deposited with the USPS**.

Petitioners point to the USPS Fax transmission showing that the application was delivered to the USPTO on 8 February, 2001, as "substantial evidence" that the application was deposited with the USPS on 7 February, 2001. Petitioners argument is without merit, however, as the USPS Fax transmission is probative evidence only as to what is contained within that document, that is, that the application was delivered to the USPTO on 8 February, 2001. Petitioners are in essence demanding the Office assume that applications deposited in Express Mail are always delivered to the USPTO the day after they are deposited. Such an argument is inapposite with the requirement of 37 CFR 1.10, which is that an applicant is entitled to a filing date of the date the application was deposited with the USPS. A prerequisite to the grant to a petition under 37 CFR 1.10 is that the applicant must provide a showing that the correspondence was deposited as Express Mail prior to the last scheduled pickup on the requested filing date.

¹37 CFR 1.6(a).

As petitioners state that they are unable to located the Express Mail label showing the date in, petitioners should note that Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

(1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;

(2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and

(3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS."

Petitioners may wish to attempt to make the showing required by 37 CFR 1.10(d). Should petitioners decide to provide evidence

from the USPS (e.g. Express Mail Corporate account Mailing Statement; letter from USPS), that evidence, to be convincing, must show the date the application was deposited as Express Mail with the USPS.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner of Patents and Trademarks
Box DAC
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By FAX: (703) 308-6916
Attn: Office of Petitions

By hand: Crystal Plaza Four, Suite CP4-3C23
2201 South Clark Place
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The application is being forwarded to Technology Center 1700 for examination in due course.

Telephone inquiries specific to this matter should be directed to the undersigned at (703) 308-6918.



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